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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 969.

SONKEN-GALAMBA CORPORATION, A CORPORATION, AND THE TANK CORPORATION, A CORPORATION, PETITIONERS,

VS.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, A CORPORATION; AND THE TEXAS AND PACIFIC RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Sonken-Galamba Corporation, a corporation, and The Tank Corporation, a corporation, respectfully show to this Honorable Court:

A.

SUMMARY OF MATTER INVOLVED.

(a) The tariffs of virtually all railroads, on file with the Interstate Commerce Commission, provide, as stated in the opinion, that rates on "scrap" shall apply on "pieces (separate or combined) of iron or steel having value for remelting purposes only," substantially the dictionary definition. Petitioners contend that the Eighth Circuit Court of Appeals following its own previous decision of *Crancer* v. *Lowden*, 121 F. 2d 645, certiorari granted October 13, 1941, No. 505, and now pending for argument in this court, has misconceived and approved an erroneous and illegal test of the "value" in question.

This tariff definition has given the Interstate Commerce Commission a great deal of trouble. The Commission has recognized that if it is so interpreted and applied as to make the rate really dependent on the use a given shipment is put to, it is unlawful, commenting on "the difficulty of framing any definition that is wholly free from elements of unlawfulness. *Weissbaum & Co.* v. *Dir. Gen.*, 53 I. C. C. 681." *Class. Ratings on Rags*, 98 I. C. C. 591; *Consol. Stone Cases*, 200 I. C. C. 65. To escape this, the Commission has ruled that the note is only valid as descriptive of the nature of scrap. The definition is so indefinite and sets up so doubtful a standard and is so susceptible of abuse and misunderstanding as to render any ground at all of sustaining same extremely tenuous and restricted. Petitioners present the only interpretation upon which the validity of the note can possibly be saved, if at all. But this theory was denied and rejected by the courts below.

Petitioners are scrap-dealers operating in the Southwest. In that part of the country, principally Texas and Oklahoma, known as the Mid-Continent oil fields, in the early development of the oil industry large tank farms were formerly used for oil storage. Due to proration, obsolescence, pipe lines, and advanced theories of underground

storage these farms have been abandoned. Numerous old, rusted, huge, steel tanks weighing about 250 tons each stand empty in the fields. When sold they bring from $200 to $1,500, although originally costing $15,000 to $30,000 (R. 3095, 673, 2310, 2328, 3106) (1627, 141, 148, 206, 676, 788).

For many years the only market for such abandoned oil storage tanks has been the scrap-dealers, who in turn wreck them. They sell and ship the pieces to the mills, who remelt them with pig-iron in their furnaces. Particularly has this been true throughout the states lying East of the Mississippi (R. 673-6, 2309-19, 2321-28, 868, 871).

The Eastern railroads connecting with the bulk of the country's mills, members of the Trunk Line Freight Inspection Bureau, an association of the Eastern railroads, functioning as their classification and rating agency have specifically classified the very commodity as scrap, moving at scrap rates (R. 370-376). See quotations from letters, pages 5-6, *post.*

95% of the nation's steel mills are concentrated East of the Mississippi and they normally draw their scrap supplies from nearby territory, since the freight and the delivered price are thus minimized. Distant scrap dealers in the Southwest cannot ordinarily compete with Eastern scrap dealers for mill business. Therefore in the Southwest comparatively little scrap moves to the Eastern mills except when scrap prices are high, all of which the Interstate Commerce Commission has repeatedly pointed out. Consequently these abandoned oil tanks have stood in the Southwest for years rusting in the fields, during the very period that throughout the East there flourished an extensive, consistent, established business therein conducted by the scrap dealers (164 I. C. C. 587; R. 3528, 3507-8, 3384, 778, 865, 1490).

In the latter part of 1936 exports of scrap steel from the East increased and prices went up. Petitioners appreciated that the Southwest with its Gulf ports could

share in this export trade. They began buying and wrecking these old tanks in the Southwest. They transported the pieces either by truck or in open cars without protection from damage or elements, in the prescribed manner for shipping scrap, and in consideration of which low rates are accorded to scrap (R. 1575, 1631, 864, 778, 1128; 226 I. C. C. 683; 164 I. C. C. 487).

Such of the commodity as the Eastern mills would absorb was sold and shipped to them. Part of the surplus was for a short time exported, but this was discontinued by governmental regulation several years ago. To dispose of quantities that remained on hand petitioners resourcefully interested several local tank builders in the vicinity of the wrecking operations in experimenting in reconditioning the lighter pieces and constructing small tanks therefrom. This business, too, proved purely temporary and ultimately unsuccessful. Petitioners, through individual sales efforts, disposed of additional limited quantities for numerous, different miscellaneous uses to parties scattered over nearby territory. Lastly, it appeared that oil companies in this territory from time to time had tanks carefully dismantled and reerected nearby. Only a few dealers other than petitioners entered the field to engage in like activities (R. 2736, 2387, 2585, 2330, 2662).

Up to 1936 all railroads, Western and Eastern alike, transported this old tank material as scrap at scrap rates, recognizing no consistent value therefor except as elementary metal. However when the Southwest export movements to Houston began, the Western Weighing and Inspection Bureau, a private association of over 100 Western railroads, corresponding to the aforementioned Trunk Line Freight Inspection Bureau in the East, suddenly notified all members that this commodity was not scrap and the higher "plate" rate should be applied. Thereupon respondents and other Southwestern railroads refused to transport the commodity at scrap rates, although a few Southwest carriers continued to do so. The Bureau based

its stand on the aforementioned exports and local uses, asserting that by reason thereof the commodity had value for other than remelting purposes (R. 321 to 325).

The Bureau also endeavored to persuade Trunk Line Freight Inspection Bureau and Official Classification Committee, serving Eastern carriers, to classify as "plates" and not scrap, a number of carloads of the identical kind of material involved here. These Eastern Committees refused to do so. The Trunk Line Bureau wrote (R. 370, 1):

> "Our inspection disclosed that the material in all the shipments referred to was purchased as Scrap Iron and consisted of old used Steel Tank Plates of various sizes and upon arrival at their plant were unloaded in their stock house with other scrap where it was cut into small pieces and is to be remelted in their open hearth furnaces. These shipments were invoiced as Scrap Angles and Tank Plates, and were described for shipment either as Scrap Iron or Scrap Iron consisting of Old Tank Plates. The material was loaded loose at random and was not braced or protected in any manner and some of the plates, particularly those which were in the shape of a triangle, were badly bent.
>
> For your information, would advise that the Weirton Steel Company are large manufacturers of various Iron and Steel articles and they receive numerous shipments of Scrap Iron daily which is used by them in the manufacture of their products.
>
> In view of the foregoing, you will observe that this material is nothing more than scrap iron or steel and shipments were correctly charged at the Scrap Iron rate as originally billed."

The Official Classification Committee wrote (R. 380, 1):

> "This committee has, for many years, held and is still holding that iron articles of this character, which are offered for shipment as scrap iron having value for remelting purposes only and on which charges have been assessed at the rating for the specific article, that if it is proven to the satisfac-

tion of the terminal line that the shipments had value only for remelting purposes and are actually remelted, the scrap iron ratings would apply thereto. In this particular case, Mr. Krill's investigation has developed that these old used steel tank plates were described for shipment either as 'scrap iron,' or 'scrap iron consisting of old tank plates' and were at destination cut into small pieces to be remelted in open hearth furnaces. Under the circumstances, we feel that these two shipments from Ranger to Weirton should be charged for at the scrap iron rates."

(b) Petitioner, Sonken-Galamba Corporation, contending that the character of the commodity was to be determined as a class by the vast stream of commerce therein as a whole, and not by local uses in a single part of the country or by exports to foreign countries, mandamused the respondent, Texas and Pacific Railway Company, in the United States District Court of Texas. Judgment, pursuant to a jury verdict that the material there involved was scrap, was affirmed by the Fifth Circuit Court of Appeals and this court denied certiorari. *T. & P. Ry. Co.* v. *Sonken-Galamba Corp.*, 100 F. 2d 158, 306 U. S. 655.

The Bureau, refusing to recede from its stand, said petitioner then successfully mandamused all of the remaining respondents in the District Court of Missouri, the commodity there involved being adjudged scrap. Furthermore, in this latter proceeding the Western Weighing and Inspection Bureau, which the court found was "acting for and on account of the railroads respondents herein and other railroads" was joined and was ordered to "forthwith and henceforth discontinue, cease and desist from classifying the material hereinbefore referred to and material of the same class and similar thereto that may hereafter be tendered for shipment by relator as being anything other than iron or steel scrap having value for remelting purposes only, carrying a tariff rate accordingly." This judgment was affirmed by the Eighth Circuit Court

of Appeals. *A., T. & S. F. Ry. Co.* v. *Sonken-Galamba Corp.*, 98 F. 2d 457.

Still another carrier was similarly mandamused in the United States District Court of Missouri. *Sonken-Galamba Corp.* v. *K. C. So. Ry. Co.* (R. 660-662). And yet another railroad filed suit in the United States District Court of Texas for alleged undercharges and a jury found the material to be scrap. *T. & N. O. Rd. Co.* v. *Sonken-Galamba Corp.* (R. 11-23).

Thus each of the respondents was a party to a suit brought by one of the petitioners in which the particular material involved was adjudged to be scrap, and all were members of the Bureau against which judgment was rendered so classifying all similar material.

(c) While all this was going on the price of scrap dropped sharply. Petitioners, who were affiliated, thereupon filed suit in the United States District Court, Missouri, against the respondents under Section 8 of the Interstate Commerce Act for alleged damages, including loss of business and profits, sustained by reason of respondents' wrongful refusal to transport as scrap not only the particular material involved in the mandamus suits but also other like material (R. 1).

The carriers based their defense on the export and other local uses aforementioned, taking numerous depositions to establish same, though they were never denied. They summarized these facts in affidavit form and then unsuccessfully petitioned the United States Circuit Court of Appeals for the Eighth Circuit for leave to reopen and set aside the mandamus proceeding. *A., T. & S. F. Ry. Co. et al.* v. *Sonken-Galamba Corp.*, 106 F. 2d 899.

Thereupon the damage suit went to trial. The trial court reversed his own views previously expressed in one of the mandamus cases aforementioned. He rejected petitioners' contention that local, temporary, partial uses of the commodity in a single part of the country did not give color to the traffic in such commodity as a whole or fix

the identity of the class thereof. He refused to hold that the true test of the value in question was its uniform, general value by which the commodity was nationally recognized as a class. He also rejected petitioners' contention that the mandamus judgments were conclusive that all material in the same class was scrap (R. 193 to 204).

(d) While an appeal was pending respondents filed a petition with the Interstate Commerce Commission calling attention to the mandamus cases and the damage suit, asking an investigation concerning rates, rules, regulations and practices governing interstate transportation from and between points "*in western territory* of steel plates from dismantled oil tanks." This petition was denied.

(e) The Circuit Court of Appeals for the Eighth Circuit on appeal affirmed the District Court holding:

> "The commodity in mass is not susceptible of a positive classification because each tendered shipment must be subjected to the test as to whether it has a value for other than remelting purposes."

The court also held that the mandamus judgments were conclusive only as to the particular shipments or material therein passed on, and was not conclusive as to the entire class of such commodity. It also held that petitioners were not entitled to damages because their claim was bottomed on injury to their business as a whole including material not involved as well as that involved in the mandamus cases, and under the court's view that such unadjudicated material was not scrap there could be no recovery (R. 193-204).

B.

STATEMENT OF THE BASIS FOR JURISDICTION.

(a) The writ of certiorari is applied for under Rule 38 and Section 240(a) of the Judicial Code as amended

by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a)), and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit is January 8, 1942 (R. 3887, Opinion same date, R. 3873).

(c) The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions relied on, for the reasons set out herein, for the allowance of the writ.

C.

QUESTIONS PRESENTED.

This petition tenders two important questions that should be settled by this court:

1. Under a freight rate tariff filed pursuant to requirements of the Interstate Commerce Act, "scrap" rates are stated to apply on "pieces * * * of steel * * * having value for remelting purposes only." Does this have reference to the particular value attaching to each specific shipment measured alone, or does it refer to the value generally attached to the commodity as a class, having regard to the national commerce therein as a whole?

Is the true standard the recognized commercial value which identifies the commodity as a class generally and uniformly throughout the nation, or is each separate shipment scrap according to whether that particular shipment has a market for remelting purposes only or for some other use?

Petitioners contend that to attain the uniformity required by the nationally operative Interstate Commerce Act, the true test is the same as that declared by this court under other general enactments, for example, the federal duties tariffs, viz., value which is definite, uniform and general as distinguished from local, personal or partial values. In short, is the view taken by the Eastern railroads and their aforenamed rating bureau correct or are the Western carriers and their rating bureau right?

2. Under the Interstate Commerce Act prohibiting discriminations, various remedies, including mandamus, are provided whereby to settle classification disputes. After a final judgment against a railroad adjudging the classification of specific material, is not that question conclusively settled as to all similar shipments of material of the same class, by any and all subsequent shippers, at least so far as that carrier is concerned?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The Circuit Court of Appeals, as will appear from the argument, *post*, has decided in a way probably untenable important questions of federal law which should be settled by this court.

(1) Inasmuch as this court granted certiorari in *Crancer* v. *Lowden*, 121 F. 2d 645, October 13, 1941, No. 505, the very case decided by and followed by the court below, it seems desirable that certiorari be granted in the instant case also.

(2) A confused and intolerable situation exists among scrap-dealers, mills and railroads that requires clarification. The Interstate Commerce Commission has ruled that there is "little, if any, material which in a strict sense can be said to be of such a character as to have value for remelting purposes only" (136 I. C. C. 703), yet the Court below has declared the definition is to be literally applied in a strict and narrow sense. If adhered to, this leaves the tariffs with no workable classification for commercial scrap and demoralizes the industry. East of the Mississippi the enormous steel tonnage derived from wrecked oil tanks is in the present state of the evidence regarded as scrap for transportation purposes, but West of the Mississippi it has now been ruled that identical material is not scrap. Again, if the test subscribed to by the Court of Appeals is adhered

to one carload of the commodity may be considered not to be scrap because sold for some useful purpose, while an identical car alongside for which no market but the mills could be found would be considered scrap. Judicially to sanction such a discriminatory practice will destroy the uniformity commanded by the Interstate Commerce Act. In effect it sets up as a criterion of identity the use to which each given shipment is put, a rate-making test which this court has held to be illegal.

(3) It has generally been supposed that decisions dealing with rates prescribed under the authority of the Interstate Commerce Act inure to the benefit of the general public. Otherwise discrimination in favor of formal parties to the proceedings will be fostered. It seems important to settle whether court and commission decisions classifying commodities for rate purposes should not similarly be conclusive against the carriers involved, at the instance of any shipper and in respect of any shipment of a commodity falling in the same class.

(4) The present importance of the subject-matter, scrap steel, invites a decision that will dispel all doubt as to whether the vast potential supply thereof, needed urgently at the present time by the mills, may be made available from these old steel oil tanks, which must rust in the fields if not transportable as scrap at scrap-rates.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11998, *Sonken-Galamba-Corporation, a Corporation, and The Tank Corporation, a Corporation, Appellants,* v. *The Atchison, Topeka & Santa Fe Railway*

Company, a Corporation; Missouri-Kansas-Texas Railroad Company, a Corporation; Missouri-Kansas-Texas Railroad Company of Texas, a Corporation; and The Texas and Pacific Railway Company, a Corporation, Appellees, and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper; and your petitioners will ever pray.

Sonken-Galamba Corporation and
The Tank Corporation,

Petitioners,

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